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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER of the Petition of Greycliff Wind Prime, LLC To Set Terms and Conditions for Qualifying Small Power Production Facility Pursuant to M.C.A. § 69-3-603	UTILITY DIVISION DOCKET NO. D2015.6.84

GREYCLIFF WIND PRIME, LLC'S MOTION FOR SUMMARY JUDGMENT ON THE LEGAL ISSUE OF WHETHER NORTHEWESTERN ENERGY HAS AN OBLIGATION TO NEGOTIATE IN THE ABSENCE OF THE ALL SOURCE COMPETTIIVE SOLICITATION SET FORTH IN A.R.M. § 38.5.1902(5).

I. INTRODUCTION.

Petitioner Greycliff Wind Prime, LLC (hereinafter "Greycliff"), acting by and through counsel, hereby files this motion for summary judgment with the Montana Public Service Commission ("Commission") on the sole question of whether legally, NorthWestern Energy ("NWE"), has an obligation to negotiate with Greycliff in the absence of an all source competitive solicitation conducted pursuant to the precise terms of A.R.M. § 38.5.1902(5). As noted in Exhibit 2 to Greycliff's petition to set terms and conditions before this Docket, NWE has taken the position that it cannot negotiate with Greycliff because the Commission has yet to repeal or amend A.R.M. § 38.5.1902(5). Because A.R.M. § 38.5.1902(5) does not expressly

require NWE to negotiate, even when it does not hold all source competitive solicitations as required by A.R.M. § 38.5.1902(5), NWE believes it has no obligation to negotiate. Thus, for projects larger than the standard offer (installed capacity of 3 megawatts ("MW") or less), there is no path to a long-term contract to sell their generation even when NWE does not hold all source competitive solicitations.

NWE's position is inconsistent with PURPA, as was made clear by the Federal Energy Regulatory Commission ("FERC") in *Hydrodynamics et al,* 146 FERC ¶ 61,193, P. 33 (2014), yet NWE continues to refuse to negotiate with qualifying facilities ("QFs" or individually, "QF") such as Greycliff, continues to obstruct PURPA in Montana, and continues in particular to obstruct the Greycliff project. Greycliff believes, at a minimum, NWE had an obligation to negotiate with Greycliff and that NWE's failure to do so created in Greycliff a legally enforceable obligation ("LEO")[1] under the terms and conditions it proposes as part of the negotiation process, subject to Commission review and approval of those terms and conditions being consistent with the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824-a3 ("PURPA") In addition, Greycliff believes that the Commission has the authority under its rules to waive the application of a rule that is clearly inconsistent with FERC's rules implementing PURPA. Such a waiver, coupled with an order on this Motion for Summary Judgment finding that Greycliff has incurred a LEO under the terms and conditions Greycliff proposed, is not only consistent with PURPA and just and reasonable, it is the right thing to do for a project that has attempted to do everything in the right way so as to obtain a PPA with NWE. Greycliff should not be made to go through yet another contested case hearing which is unnecessary and will be expensive.

[1] *See* 18 C.F.R. 292.304(d)

II. PETITION.

A. Questions Presented

(1) Did NWE have an obligation as a matter of law under PURPA to negotiate with Greycliff, as a QF, when NWE is not holding competitive solicitations which comply with A.R.M. § 38.5.1902(5), and;

(2) When NWE refused to negotiate at all with Greycliff when NWE is not holding competitive solicitations which comply with A.R.M. § 38.5.1902(5), was Greycliff entitled as a matter of law to a LEO pursuant to 18 C.F.R. § 292.304(d)(2); and;

(3) When NWE refused to negotiate with Greycliff, and if the Commission determines a LEO was created by NWE's refusal to negotiate, and the Commission determines the contract terms and conditions proposed by Greycliff in its proposal and offer to negotiate[2] are consistent with PURPA and its implementing regulations, and are therefore just and reasonable, does NWE as a matter of law have an obligation to accept those contract terms and conditions due to its refusal to negotiate?

B. Standards for Motions for Summary Adjudication/Summary Judgment

Although the Commission's general procedural rules do not expressly mention motions for summary judgment, nothing in Commission's rules precludes the filing of such motions. A.R.M. 38.2.1501(1) states "[a] motion may contain any matter relevant to the clarification of the proceeding before the commission." This motion seeks to clarify that there are no outstanding issues of material fact that would require a full contested case hearing on the issue of whether NWE had an obligation to negotiate, and whether, if it failed to do so, Greycliff is

[2] As set forth in Exhibit 1 to Greycliff's Petition to Set Terms and Conditions in this Docket, which is the letter from Michael J. Uda to NWE, Dated July 2, 2015.

entitled to a LEO on the terms and conditions contained in its offer and proposal submitted to NWE on July 2, 2015, and which NWE rejected on July 8, 2015.

Summary judgment is proper when there are no material facts in dispute and the movant is entitled to judgment as a matter of law. *Hajenga v. Schwein*, 2007 MT 80, ¶ 11,336 Mont. 507, 510, ¶ 11, 155 P.3d 1241, 1243, ¶ 11. "The purpose of summary judgment is to dispose of those actions which do not raise genuine issues of material fact and to eliminate the expense and burden of unnecessary trials." *Id.* The *Hajenga* Court also explained the relative burdens on the moving and non-moving parties with regard to summary judgment determinations:

> The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues.... Where the moving party is able to demonstrate that no genuine issue as to any material fact remains in dispute, the burden then shifts to the party opposing the motion.... To raise a genuine issue of material fact, the party opposing summary judgment must present material and substantial evidence rather than merely conclusory or speculative statements.... As this Court has previously observed, "proof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel." ...in a determination as to the appropriateness and result of any summary judgment.

Id. at ¶ 13 (internal citations omitted).

In determining the existence or non-existence of a material fact in dispute, a court is obliged to consider the pleadings, discovery responses, admissions on file and any affidavits that are produced by the parties. *Id.* at ¶ 12. "In addition, all reasonable inferences that might be drawn from the offered evidence will be drawn in favor of the party opposing the summary judgment motion." *Id.* (citations omitted). However, to defeat a motion for summary judgment, respondent's evidence must be material and of a substantial nature, not fanciful, frivolous, or merely suspicious. *See Van Uden v. Hendrickson* (1980), 189 Mont. 164, 169, 615 P.2d 220, 224. "Substantial evidence" must be more than mere denial, speculation, or conclusory assertions that genuine issue of material fact does exist or that the moving party is not entitled to prevail. *See Klock v. Town of Cascade* (1977), 284 Mont. 167, 943 P.2d 1262, 1266.

Greycliff seeks summary judgment on the issues of whether as a matter of law: (1) NWE had an obligation to negotiate, (2) whether NWE's refusal to negotiate means that Greycliff is entitled to a LEO; and (3) whether NWE's failure to negotiate creates a LEO under the terms and conditions proposed by Greycliff to NWE on July 2, 2015, provided the Commission finds those terms and conditions consistent with PURPA.

C. Undisputed Facts.

Greycliff asserts the following facts are not in dispute:

1. On July 2, 2015, Greycliff's counsel sent a letter requesting that NWE negotiate an agreement with Greycliff (*See* Exhibit 1 to Greycliff Petition to Set Conditions) with a proposal. Greycliff's proposal contained terms and conditions, including a power purchase agreement ("PPA") executed by Greycliff with a proposed avoided cost consistent with the Commission's most recently approved avoided cost for NWE and sufficient guarantees of performance, and a signed interconnection agreement;
2. On July 8, 2015, NWE refused to negotiate, alleging *inter alia*, that A.R.M. § 38.5.1902(5) was still a valid rule and thus Greycliff was required to win a competitive solicitation in order to obtain an agreement to sell its generation to NWE on a long-term avoided cost rate (*See* Exhibit 2 to Greycliff Petition to Set Terms and Conditions);
3. As of the filing of Greycliff's Petition to Set Terms and Conditions, on August 17, 2015, NWE had not attempted to negotiate an agreement with Greycliff, and has not done so as of the date of the filling of this instant motion;
4. Greycliff is a self-certified qualifying facility QF under PURPA;
5. Greycliff is a 25 megawatt ("MW") wind project;

6. Greycliff has twice attempted to be certified as a Community Renewable Energy Project ("CREP") by the Commission, first in Docket D2014.1.9 and later in Dockets D2015.2.18 and D2015.3.23. The Commission did not approve either petition for certification.

D. PURPA Authority on Obligation to Negotiate and Creation of a LEO

FERC has clearly held that a utility's refusal to negotiate may create a LEO. In Grouse Creek Wind Park, FERC held: *Grouse Creek Wind Park,* 142 FERC ¶ 61,187, P. 40 (2013) holds:

> *Petitioners are thus entitled to a legally enforceable obligation in those situations where, for example, a utility has refused to negotiate a contract.* In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract. A contract serves to limit and/or define bilaterally the specifics of the relationship between the QF and the utility. A contract may also limit and/or define bilaterally the specifics of the legally enforceable obligation at the heart of that relationship. But the obligation can pre-date the signing of the contract. Moreover, the tool of "seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation" does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation. *The Idaho Commission's requirement that a QF formally complain "meritorious[ly]" to the Idaho Commission before obtaining a legally enforceable obligation would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation.* Such obstacles to QFs are at odds with the Commission's regulations implementing PURPA. They are not reasonable conditions for a state PURPA process.

(Citations omitted, Emphasis added).

In *Hydrodynamics*, FERC further ruled that:

> 31. The Commission's regulations require that a utility purchase any energy and capacity made available by a QF. Under Section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power "as available" or at a forecasted avoided cost rate pursuant to a legally enforceable obligation. In Order No. 69, the Commission explained that the "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a

contract with qualifying facility. Moreover, the Commission stated in *JD Wind 1, LLC*, that:

> [A] QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA. Accordingly, a QF by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments either result in contracts, or in non-contractual, but binding, legally enforceable obligations.

32. In *Grouse Creek*, the Commission found the Idaho Commission's requirement that a QF file a meritorious complaint to the Idaho Commission before obtaining a legally enforceable obligation "would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation." *Similarly, we find that requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation particularly where, as here, such competitive solicitations are not regularly held.*

33. The Montana Rule is therefore inconsistent with PURPA and the Commission's regulations implementing PURPA to the extent that it offers the competitive solicitation process as the only means by which a QF greater than 10 MW can obtain long-term avoided cost rates. *The Montana Rule creates, as well, a practical disincentive to amicable contract formation because a utility may refuse to negotiate with a QF at all, and yet the Montana Rule precludes any eventual contract formation where no competitive solicitation is held. Such obstacles to the formation of a legally enforceable obligation were found unreasonable by the Commission in Grouse Creek, and are equally unreasonable here and contrary to the express goal of PURPA to "encourage" QF development.*[3]

Hydrodynamics, 146 FERC ¶ 61,193, PP 31-33 (emphasis added, internal citations omitted).

Despite what FERC has held, for two years in the absence of the "all source" competitive solicitations required by A.R.M. § 38.5.1902(5), NWE is still refusing to negotiate, and dismissing FERC's rulings as merely FERC's litigation posture. NWE is thus now

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[3] *Hydrodynamics,* 146 FERC ¶ 61,193, PP 31-33 (internal citations omitted).

deliberately impeding PURPA in Montana, on the pretext that the Commission has yet to amend or repeal A.R.M. § 38.5.1902(5). However, the Commission's own rules state that NWE has an obligation to negotiate with QFs. A.R.M. § 38.5.1903(2) states:

> (2) Except as provided in ARM 38.5.1903(1), each utility shall purchase any energy and capacity made available by a qualifying facility:
>
> (a) At a standard rate for such purchases which is based on avoided costs to the utility as determined by the commission; or
>
> (b) If the qualifying facility agrees, *at a rate which is a negotiated term of the contract between the utility and the facility and not to exceed avoided cost to the utility.* However, the utility shall offer long-term contracts with qualifying facilities which permit a rate higher than avoided costs in the early years of the contract and a lower rate in the latter years.

(Emphasis added). This provision is directly preceded by A.R.M. § 38.5.1903(1), which states, consistent with FERC's regulations implementing PURPA[4], that "[e]ach utility shall purchase any energy and capacity made available by a qualifying facility . . ."

Montana's min-PURPA, M.C.A. §§ 69-3-601 through -604, does not even reference competitive solicitations or even imply that such solicitations are an impediment or a substitute for agreements between utilities and QFs. M.C.A. § 69-3-603(1) states: "Except as provided in subsection (3), if a qualifying small power production facility and a utility *are unable to agree* to a contract for the sale of electricity or a price for the electricity to be purchased by the utility, *the commission shall require the utility to purchase the electricity under rates and conditions* established under the provisions of subsection (2)." (Emphasis added). The 2011 legislature specifically amended M.C.A. § 69-3-603 to add that a QF eligible for a standard rate (in the context here, meaning a QF with an installed capacity of 3 MW or less) could not petition the Commission for a different rate. M.C.A. § 69-3-603(3). Consequently, the implication is that

[4] See 18 C.F.R.

QFs larger than 3 MW (or a utility) may bring a disagreement over rates and conditions for a contract before the Commission for resolution. None of the foregoing implies, much less states, that competitive solicitations are a precursor to a QF exercising its rights under Montana's Mini-PURPA to bring such a dispute to the Commission for resolution. Reading the Commission's rules together in order to construe them harmoniously with Montana's Mini-PURPA, in the absence of the "all source" competitive solicitations of the type specifically set forth in A.R.M. § 38.5.1902(5), a utility continues to have the obligation to negotiate with QFs. Under *Grouse Creek* and *Hydrodynamics*, a failure to do so creates the right to a LEO and the right to long term avoided cost rates.

The Commission also has the authority to waive its rules as "good cause appears and justice may require" and the Commission "may waive the application of any rule, except where precluded by statute." A.R.M. § 38.2.305(1). Not only is waiving the rule here not precluded by statute, given the previously-stated inconsistency between A.R.M. § 38.5.1902(5) and Montana's Mini-PURPA, it may be required by statute as well as ordinary rules of statutory construction and the doctrine of separation of powers. As noted above, Montana's Mini-PURPA does not even mention competitive solicitations, nor has the legislature specifically authorized such an approach. In fact, A.R.M. § 38.5.1902(5) could be viewed as the Commission enacting a regulation that is plainly inconsistent with a remedy adopted by the legislature to implement PURPA, namely, the right to proceed to the Commission to file a petition set rates and conditions provided that the utility and the QF cannot agree on rates or conditions for a contract. As the Commission knows, it is beyond the power of the Commission to enact regulations inconsistent with a legislative enactment. Consequently, if A.R.M. § 38.5.1902(5) is not construed by the Commission to be consistent with the legislative direction contained in Montana's Mini-PURPA, namely that QFs may bring an action to set contracts terms and

conditions regardless of whether they have won an all source competitive solicitation, particularly when those solicitations are not being held by a utility, A.R.M. § 38.5.1902(5) would be an invalid rule as it is beyond the power of the Commission to enact rules without specific legislative delegation. "[T]he Commission is a creature of, owes its being to, and is clothed with such powers as are clearly conferred upon it by statute." *Montana Power Company v. Public Service Com'n* (1983), 671 P.2d 604, 611, 206 Mont. 359, 371 (quoting *Great Northern Utilities Co. v. Public Service Com'n.* (1930), 88 Mont. 180, 203, 293 P. 294, 298).

E. Summary Judgment Should be granted.

There is no reasonable interpretation of PURPA, Montana's Mini-PURPA, FERC's regulations implementing PURPA, or the Commission's PURPA regulations (which expressly adopt FERC's regulations implementing PURPA)) which would hold that NWE has no obligation to negotiate with Greycliff in the absence of the holding of competitive solicitations required by A.R.M. § 38.5.1902(5). There are no material facts in dispute that NWE refused to negotiate. As a matter of law, NWE's failure to negotiate at all resulted in Greycliff incurring a LEO. NWE's position that it had no obligation to negotiate is not only contrary to well-established law as discussed above, but contrary to common sense. If NWE is not holding all source competitive solicitations (and it is not), it cannot possibly expect to thwart its obligations under PURPA by simply refusing to negotiate. NWE is familiar with the Greycliff project, having selected the Greycliff project twice in competitive solicitations to become a CREP. The Commission will see in the PPA attached to Greycliff's Petition to Set Contract Terms and Conditions, NWE has either forgotten or declined to consider that Greycliff's QF proposal included a sale price that was less than Greycliff's all in CREP price, when one considers the cost of wind integration services. As the Commission may recall, it was only a few months previously that NWE took the position that Greycliff's project was the "lowest-cost PPA project

on a 25-year levelized basis." Docket D2015.2.18, Final Order 7395d, ¶ 14 (May 27, 2014) (citing Ex. NWE-2 p. 7). That price was $49.02 plus integration, for a total price of $53.40 and $56.95 per megawatt hour ("MWH"). *Id.* In contrast, Greycliff's QF proposal is $53.85 levelized over a 20-year term, minus wind integration for an effective rate of $50.35.

There is no need for a hearing to resolve this dispute. NWE had an obligation to negotiate and failed to do so. Greycliff met the requirements for creating a LEO in Montana and under FERC's guidance when Greycliff complied with the Commission's 2010 decision in *Whitehall Wind*, Order 6444e, Docket D2002.8.100, at ¶ 47 (June 4, 2010), and when NWE *still refused* to negotiate despite knowing about FERC's *Hydrodynamics* decision, Greycliff incurred a LEO as NWE must surely have realized. The terms and conditions offered by Greycliff are plainly just and reasonable and consistent with PURPA. There is no reason for Greycliff to potentially spend additional resources litigating a dispute over which there can be no reasonable disagreement.

III. RELIEF REQUESTED

(1) Greycliff respectfully requests the Commission waive application of A.R.M. § 38.2.1902(5) to clarify the rule has no applicability to Greycliff in this instance;

(2) Greycliff respectfully requests that the Commission grant summary judgment on the following issues:

(a) That NWE had an obligation to negotiate, regardless of A.R.M. § 38.2.1902(5), and failed to do so;

(b) That NWE's failure to negotiate resulted in the creation of a LEO for Greycliff, on the terms and conditions set forth in Greycliff's proposal.

There are good policy reasons why the Commission should find that a failure to negotiate by a utility will create a LEO. As discussed previously, FERC noted in both *Grouse Creek*

Wind Park I and in *Hydrodynamics*, impediments to amicable contract formation are not to be utilized as they create a disincentive for utilities and QFs to work out matters between them. Negotiated agreements are far preferred as they do not require Commission intervention, or the substantial use of resources by either utilities or QFs. There is simply no reason a hearing in this case would not be simply another unreasonable impediment in the way of amicable contract formation. Admittedly, Greycliff's relief would technically be limited to its project, but the idea of the Commission promoting negotiations as a way to resolve these matters is a far preferable method to contested case hearings which consume scarce Commission and party resources.

Finally, Greycliff has done everything it possibly could to obtain a PPA from NWE. It competed in and won two separate CREP solicitations. Through no fault of its own, Greycliff was twice denied. Greycliff complied with the Commissions' decision on LEO formation in *Whitehall Wind.* Greycliff has spent a considerable amount of money attempting to obtain a PPA from NWE, but yet today it still has no agreement to sell its output.

IV. CONCLUSION

For the reasons set forth herein, Greycliff respectfully requests its motion for summary judgment be granted.

RESPECTFULLY SUBMITTED this 4th day of September, 2015.

UDA LAW FIRM, PC

By: _____

Michael J. Uda
Attorney for Greycliff Wind Prime, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on this 4th day of September, 2015 upon the following by first class mail postage pre-paid:

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I hereby certify an original was e-filed, and ten copies of the foregoing were hand-delivered to the following:

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